

In the August 13, 2001 Award, Judge Barnes determined claimant's February 1998 accidental injury was not caused by an activity of day-to-day living but, instead, arose out of a work-related activity. Moreover, the Judge found claimant's right leg injury resulted from overcompensating for the left knee injury and, therefore, awarded claimant a six percent permanent partial general disability for the bilateral knee injuries. The Judge adopted the functional impairment opinion provided by Dr. C. Reiff Brown and disregarded the functional impairment rating provided by Dr. Jay Stanley Jones because it was not based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Respondent and its insurance carrier contend Judge Barnes erred. They argue claimant failed to prove that she injured herself at work. Respondent and its insurance carrier do not dispute that claimant experienced the onset of left knee pain while she was at work, but they contend there was no causal link between the work and the injury. They also argue claimant failed to prove the right knee injury arose out of claimant's employment. Accordingly, respondent and its insurance carrier request the Board to deny claimant's request for benefits. In the alternative, they request the Board to deny claimant's request for benefits for the right knee injury.

On the other hand, claimant requests the Board to affirm the Judge's finding that claimant is entitled to receive benefits for both knees. But claimant argues that if any changes are made to the Award and Nunc Pro Tunc, the Board should increase the permanent partial general disability.

The issues before the Board on this appeal are:

1. Did claimant injure her left knee on February 24, 1998, as the result of an accident that arose out of and in the course of employment with respondent?
2. If so, did claimant also injure her right knee while compensating for the left knee injury?
3. If the right knee injury was not a natural consequence of the left knee injury but, instead, a new and distinct accident, did claimant provide respondent with timely notice of that accident?
4. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Board finds, as follows:

1. Respondent operates a residential facility for the terminally ill. Claimant was employed by respondent as a resident supervisor and, therefore, was responsible for taking care of the residents and assisting them with cleaning and cooking. The facility where claimant worked was an older two-story house with a basement.

2. As the staff bedroom and the residents' bedrooms were upstairs and refrigerators were kept in the basement, claimant was often required to walk up and down the stairs. On February 24, 1998, claimant experienced a sharp pain in her left knee while she was walking down the basement stairs to obtain food for dinner. Claimant described the incident, as follows:

Q. (Mr. Busch) Would you tell the court what happened?

A. (Claimant) Well, our refrigerators for overflow is kept downstairs. Mostly we go down there to get the supper meal and bring it back upstairs. I was in process of doing that when I had this extremely sharp pain in my knee. It took my breath away, and I had to stop momentarily on the stairs to compose myself and wait to see what was going on. Then I proceeded back down the stairs to the refrigerator.

THE COURT: You were walking downstairs when this happened?

A. Yes, crossing one leg over the other simply because the stairs were too narrow to contain my full width or length of my foot.

Q. So that the judge understands, you actually go down these stairs sideways; don't you?

A. Sideways, yes, sir.¹

3. After the incident on the stairs, which occurred on a Tuesday, claimant continued working. Rather than her symptoms resolving, claimant's left knee swelled and her symptoms worsened. On the following Monday, claimant reported the incident to her supervisor and also sought medical treatment.

4. Claimant initially saw Dr. John H. Weninger, who injected cortisone into claimant's left knee and ordered an x-ray. The doctor restricted claimant from climbing stairs. Claimant's weight exceeded the capacity of the facility's chair lifts. Nonetheless, claimant continued working for respondent as she limited her work activities to the first floor.

¹ P.H. Trans. at 8 (May 19, 1998).

5. Despite her limited duties, claimant's symptoms continued and Dr. Weninger referred claimant to a specialist, orthopedic surgeon Dr. Jay Stanley Jones, who undertook claimant's treatment and eventually performed arthroscopic surgeries on both of claimant's knees.

6. In approximately May 1998, claimant experienced excruciating pain in her right knee. At that time, claimant was at work standing at the sink. Claimant likened the right knee pain to the left knee pain that she began experiencing after the February 1998 incident.

7. In July 1998, Dr. Jones operated on claimant's left knee. A subsequent MRI of claimant's right knee disclosed a meniscal tear, which Dr. Jones surgically repaired in October 1999. Part of the delay in performing the right knee surgery was due to claimant's other health problems, including hypertension.

8. Before the February 1998 incident, claimant did not have symptoms in her left knee. But a 1994 x-ray, which was mistakenly taken of the left knee, indicated claimant had degenerative changes in that joint. Before February 1998, claimant's right knee, however, would occasionally ache, which claimant attributed to a late 1960s accident. Before commencing work for respondent, claimant underwent a pre-employment physical during which she acknowledged right knee symptoms, which the doctor noted as bursitis.

9. When claimant testified at the October 18, 2000 Regular Hearing, she was working for respondent in an accommodated position. Accordingly, claimant was not seeking a work disability (a permanent partial general disability rating greater than the whole body functional impairment rating).

10. Claimant presented Dr. Jones' deposition testimony. The doctor, who first saw claimant in late June 1998, testified he initially suspected a meniscus tear in claimant's left knee, which he later confirmed with an MRI. In July 1998, the doctor performed a partial meniscectomy. As indicated above, the doctor also found a meniscus tear in the right knee, which he also operated. Dr. Jones believes claimant's right knee injury developed as the result of overusing and compensating for the left knee injury. The doctor rated claimant as having a 24 percent whole body functional impairment, using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* as a guide and using his judgment and experience, or "guesstimate," regarding the impairment that claimant has sustained from the arthritis in both knees, loss of range of motion, chondromalacia and ongoing symptoms.

11. On the other hand, Dr. C. Reiff Brown, who in September 2000 examined claimant at the Judge's request, determined claimant sustained an additional four percent whole body functional impairment as a result of the February 1998 left knee injury that claimant

sustained going down the stairs and an additional two percent whole body functional impairment that claimant sustained due to compensating or overusing the right knee after the left knee injury. The doctor combined those two ratings and determined claimant sustained a six percent whole body functional impairment directly attributable to the work-related injuries that are the subject of this claim.

12. The Board affirms the Judge's finding that Dr. Brown's functional impairment opinion is more persuasive. Accordingly, the Board finds that claimant has sustained an additional six percent whole body functional impairment directly attributable to the February 1998 accident to the left knee and the impairment to the right knee due to compensating for the February 1998 left knee injury.

CONCLUSIONS OF LAW

The Award and Nunc Pro Tunc should be affirmed.

The Board concludes claimant's left knee accidental injury arose out of and in the course of employment with respondent. Respondent argues the February 1998 left knee injury occurred as the result of day-to-day living activities and, therefore, the injury was not directly caused by claimant's employment. The Board disagrees.

In defining "personal injury" and "injury," the Workers Compensation Act provides:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.²

But the Act does not define day-to-day living activities. The Kansas Supreme Court, however, in *Boeckmann*³ denied compensation as the worker's condition could not be traced to any stress, strain, or unusual exertion at work but, instead, everyday activities had eroded his body's fibers and any movement aggravated his condition, regardless of whether the activity occurred on or off the job. The Board concludes the above-quoted statute is a codification of *Boeckmann*.

² K.S.A. 1997 Supp. 44-508(e).

³ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

The Kansas Court of Appeals has also held that although a preexisting condition may be aggravated by everyday activities, that fact alone is not controlling.

Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed.⁴

Claimant's accident is distinguishable from the worker's situation in *Boeckmann* because claimant's injury occurred from a hazard or risk directly related to claimant's work and what claimant was required to do in fulfilling her work duties as a resident supervisor. Claimant was required to obtain food from refrigerators in the basement and her accidental injury occurred as she was descending the somewhat steep stairs to that location. Accordingly, claimant's left knee injury directly resulted as a consequence of her employment. Likewise, the Board concludes claimant's right knee injury is a direct and natural consequence of the left knee injury as the medical evidence is overwhelming that the right knee was injured while compensating for the left knee injury.

When a primary injury under the Workmen's Compensation Act arises out of and in the course of employment every natural consequence that flows from the injury is compensable if it is a direct and natural result of the primary injury.⁵

Accordingly, claimant is entitled to receive workers compensation benefits for both the left and right knee injuries.

Because the right knee injury was a natural consequence of the left knee injury, claimant was not required to give respondent new or separate notice of the right knee injury.⁶

As indicated above, at the time of regular hearing claimant was only requesting a permanent partial general disability based upon her functional impairment rating as she was working for respondent in an accommodated position. Claimant has established a six percent whole body functional impairment rating for the resulting injuries to both knees. Accordingly, claimant is entitled to receive benefits for a six percent permanent partial

⁴ *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992) (citation omitted).

⁵ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, Syl. ¶ 2, 564 P.2d 548 (1977).

⁶ See *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 358, 995 P.2d 855 (2000).

general disability under K.S.A. 1997 Supp. 44-510e. Nothing should be deducted from this award due to preexisting functional impairment as the preexisting impairment was deducted by Dr. Brown when he determined that claimant had sustained a six percent whole body functional impairment for the injuries directly attributable to the February 1998 left knee injury and the right knee injury due to claimant compensating or overusing the right knee due to the February 1998 left knee injury.

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the August 13, 2001 Award and the undated Nunc Pro Tunc.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation